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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1975

No. 75-381

JOE CHACON, JR., ET AL, PETITIONERS

Vs.

SAM GRANATA AND RANDOLPH AIR FORCE BASE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August, 1975

IN THE
SUPREME COURT OF THE UNITED STATES
SEPTEMBER TERM, 1975

NO.

JOE CHACON, JR., ET AL, Petitioners

VS.

SAM GRANATA AND RANDOLPH AIR FORCE BASE, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 10, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported in 515 F2d 922 and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 10, 1975. A timely petition for rehearing

was denied on July 28, 1975, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA §1254 (1).

QUESTIONS PRESENTED

1. Do landowners have the right to sue the United States Air Force for damages to their land caused by air traffic and the danger resulting?

2. Where the sole purpose of annexation is to create illegal spot or belt zoning, must the damaged landowner await completion of the illegal plan before obtaining any relief from the Courts?

3. Will the Courts presume the validity of legislation affecting people who are denied the right to vote where the legislative motive is clearly unconstitutional?

STATUTORY PROVISIONS INVOLVED

United States Constitution Amendments 5 and 14.

United States Code: 28 USCA 1346, 2201, 2674, and 42 USCA 1983.

STATEMENT OF THE CASE

A great deal of growth has occurred on the north approach to the runways of Randolph Air Force Base. Randolph Air Force Base desiring to stop growth on the south runways threatened the City of

San Antonio with removing the Air Force Base if the City of San Antonio did not annex the area and zone it in such a manner as to prevent such growth. The City of San Antonio responded to the threats of Randolph Air Force Base and the threat to its economy, annexed a fan-shaped area to the south of the Randolph Air Force Base runway which was rural and was more than six miles from the city limits of San Antonio, and prepared a Zoning Ordinance restricting use of the land. Such Zoning Ordinance has now come into effect and become law. Poor farmers in a rural area run the risk of bankruptcy because of high city taxes. They can no longer lease their land for hunting. Use and saleability of their land has been restricted.

Petitioners sued in the District Court to enjoin the annexation and zoning, for Declaratory Judgment, and alternatively sued for damages to their property resulting either from the annexation and zoning, damages from the use of the air over their land by the Air Force at Randolph Air Force Base, and inverse condemnation. The District Court set Petitioners' Motion for Temporary Injunction for a hearing, and without further notice of any kind, proceeded to hear evidence on the merits and summarily dismiss the cause of action. Petitioners appealed to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit affirmed holding that the United States could not be sued, and that the Petitioners' suit against San Antonio was premature.

REASONS FOR GRANTING THE WRIT

1. The United States will admit that its only purpose for requiring the annexation and zoning is to prevent a use of the land south of Randolph Air Force Base which may be incompatible with the use of the Base. The City of San Antonio will not in good faith deny that the only reason for annexing and zoning the area is for the benefit of Randolph Air Force Base. The effect of these actions is to take an interest in land from the Petitioners without just compensation contrary to the Fifth Amendment of the United States Constitution. The Court of Appeals has ignored two opinions of the Supreme Court which hold this a clear violation of the Fifth Amendment. United States v. Causby et ux. 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206. United States of America v. C.M. Dow. 357 U.S. 17, 78 S.Ct. 1039, L.Ed. Quoting from Causby on page 1066:

> "....In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves."

2. The holding of the Court of Appeals that the United States cannot be sued is directly contrary to the legislative expression set out in 28 USCA §1346 (2), (2)(b) and 28 USCA 2674. Quoting from §1346:

> "(a) The district courts shall

have original jurisdiction concurrent with the court of claims, of...."

"(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

"(b) Subject to the provisions of Chapter 171 of this title, the district courts,....shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages....for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employer of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable...."

3. The right to vote upon annexation is a valuable constitutional right which has been denied to Petitioners in this case. Where the right to vote is denied,

the Court should not presume any fairness in legislation or adopt the policy that under no circumstances can the motivations of the legislative body be inquired into. The denial of a right to vote violates 42 USCA 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or address."

4. The denial to Petitioners of recourse to the Courts is in this case expressly contrary to the legislative expression and intent of the civil rights act, 42 USCA 1983 and the Declaratory Judgment Act 28 USCA 2201.

In summary-with our maze of governmental agencies, it is a simple thing for those with excessive economic or political clout, to accomplish an illegal objective indirectly through legislative or administrative edict. If the governmental agency is not limited to the exercise of bona fide governmental functions and to the exercise of legi-

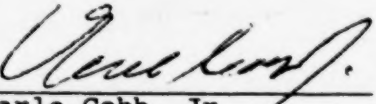
timate motives, the individual has no constitutional rights. Particularly is this true in our case where the individual also has no vote and is denied judicial review. We have here both control and taxation without representation and denial of due process.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment of opinion of the Fifth Circuit.

Respectfully submitted,

COBB, THURMOND & BAIN, INC.

BY: 

Earle Cobb, Jr.
Counsel for Petitioners

August , 1975

APPENDIX

Court of Appeals

515 F2d 922

District Court

APPENDIX

CHACON v. GRANATA

515 F2d 922

JOSEPH CHACON, JR., ET AL.,
Plaintiffs-Appellants,

V.

SAM GRANATA ET AL., AND RANDOLPH
AIR FORCE BASE
Defendants-Appellees.

No. 74-3295.

United States Court of Appeals,
Fifth Circuit.

July 10, 1975.

Rehearing Denied on July 28, 1975

Action was brought against city and air force base seeking injunctive and declaratory relief with respect to annexation of plaintiffs' land by city, allegedly as first step in scheme undertaken by defendants to deprive plaintiffs of their property without just compensation, either by unlawful zoning ordinances or eminent domain proceedings initiated after annexation had driven down property values. The United States District Court for the Western District of Texas, at San Antonio, John H. Wood, Jr., J., dismissed the complaint and plaintiff appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that defendant air force

base was immune from suit; that action was premature where no zoning ordinances affecting the land had been passed and no eminent domain proceedings had been instituted; that annexation itself inflicted no legal injury on plaintiffs even if it caused a decline in the value of their property; that injury was not immediate or irreparable so as to be predicate for injunction; and that since annexation was lawful in its effect, motives of those who legislated it were beyond judicial scrutiny.

Affirmed.

1. United States

Air force base, as an agency of the United States Government, was immune from suit wherein plaintiffs sought injunctive and declaratory relief with respect to annexation of their land by city, which was allegedly first step in scheme undertaken by city and air force base to deprive plaintiffs of their property without just compensation.

2. Municipal Corporations

Annexation of land by city under Texas law was procedurally proper despite contention that annexation ordinance was enacted in violation of landowners' right to vote.

3. Declaratory Judgment

Action seeking declaratory and injunctive relief with respect to

annexation of plaintiffs' land by city on theory that annexation was first step in scheme undertaken to deprive plaintiffs of their property without just compensation, either by unlawful zoning ordinances or by eminent domain proceedings initiated after annexation had driven down property values, was premature, since whatever wrong annexation might inflict would be merged unto ultimate acts, if any, constituting a deprivation of plaintiffs' rights, so that the annexation itself was nothing more than inchoate wrong that might never ripen.

4. Municipal Corporations

Annexation of private land by city inflicted no legal injury on landowners, though it may have caused a decline in the value of their property.

5. Eminent Domain

Legislative and administrative action which affects property values without any diminution of the owners' right of use do not constitute a "taking" within the purview of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

6. Injunction

Injunction is appropriate only if the anticipated injury is imminent and irreparable.

7. Municipal Corporations

Anticipated injury to landowners

from annexation of their land, allegedly undertaken by city to deprive them of their property without just compensation either by unlawful zoning ordinances or by eminent domain proceedings, was neither imminent nor irreparable, and thus could not be predicate for injunction, where no zoning ordinances had been passed applicable to such land and since, if annexation served no purpose other than to depress the value of the land and such loss of value was a legally cognizable injury, plaintiffs could seek compensation for the value of the land as determined at the time of the annexation.

8. Statutes

In reviewing enacted legislation, the courts presume, as a matter of construction, that the legislative body has acted with due regard for the constitutional rights of affected parties.

9. Evidence

In considering whether anticipated injury is imminent for purposes of granting injunctive relief, where a legislative body has not yet acted, courts must presume that when it does act it will respect rights guaranteed by the Constitution.

10. Eminent Domain

If annexation serves no purpose other than to depress value of land prior to exercise of city's power of eminent domain, and if such loss of

value is a legally cognizable injury, landowners can seek compensation in the eminent domain proceedings for the value of the land as determined at the time of the annexation.

11. Municipal Corporations

Where annexation of private land by city was lawful in its effect, motives of those who legislated it were beyond judicial scrutiny.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Associate Justice,* and GOLDBERG and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

In this case involving the annexation of outlying private lands by the City of Antonio, Texas, we must determine whether the District Court erred in denying all relief and dismissing plaintiffs' complaint, which alleged that the annexation is the first step in an unconstitutional plan by the City and nearby Randolph Air Force Base to take plaintiffs' land without just compensation.

I. Factual Background

Plaintiffs are twenty owners of

land near the City of San Antonio, Texas. They filed their complaint in this action on June 13, 1974, against the City of San Antonio, its City Manager, and Randolph Air Force Base--minutes after the passage of an ordinance by the San Antonio City Council annexing a large tract of land, including their parcels, near Randolph Air Force Base. The complaint alleged that the annexation was the first step in a scheme undertaken by the City and the Air Force Base to deprive them of property without just compensation, either by unlawful zoning ordinances or eminent domain proceedings initiated after the annexation has driven down the property values. According to the City Manager of San Antonio, the purpose of the anticipated zoning or condemnation is to prevent uses of the subject land that would interfere with aircraft operations at the Air Force Base. Representatives of Randolph Air Force Base admit that the possibility of residential development of this land (now devoted to farming) is a source of official concern, because of the danger of airplane crashes.

(1) The complaint sought, among other things, a temporary restraining order against the annexation, a permanent injunction against any further exercise of jurisdiction over the subject lands by the City, a declaration that the annexation ordinance and proposed zoning ordinances (creating an "airport overlay" district in which land use would be restricted in order to assure safe approaches to the runways of Randolph Air Force Base) are

unconstitutional, a declaration that the section of the city charter pursuant to which the annexation ordinance was passed is unconstitutional, and reasonable damages. After a hearing at which the testimony of three witnesses[1] was taken and the parties argued the applicable law, the District Court made findings of fact and conclusions of law. The Court held that the annexation, considered by itself, is lawful under prior decisions of this Court, and that plaintiffs' challenge to anticipated[2] zoning or condemnation proceedings by the City is premature. On this basis the Court concluded that no ripe controversy was presented for decision and dismissed the complaint with prejudice for lack of jurisdiction. Plaintiffs appeal from this adverse judgment.

1. Colonel John F. Rollston, an official at Randolph Air Force Base, testified concerning the dangers of permitting residential development near the airfield, and stated that he had expressed his opinion on this subject to City officials. Mr. Sam Granata, City Manager of San Antonio, testified concerning the purposes the City Council hoped to serve by annexing the subject land. One of the plaintiff property owners, a Mr. Boenig, gave testimony concerning the adverse effects he foresaw from zoning his land.

2. The Court also held that Randolph Air Force Base, as an agency of the United States Government, was immune from suit and should be dismissed from the case. We agree. See Blackmar v. Guerre, 342 U.S. 512, 72 S.Ct. 410, 96 L.Ed. 534 (1952); Fort Worth Nat. Corp. vs. Federal Savings & Loan Ins. Corp., 5 Cir., 1972, 469 F.2d 47, 54.

II. Validity of the Annexation and Prematurity of Plaintiffs' Other Claims

(2) Although Plaintiffs' complaint alleges that the annexation ordinance was enacted in violation of their right to vote, it cannot be doubted that the annexation was procedurally proper. This Court has twice upheld annexations factually indistinguishable from this one. Incorporation Committee of the City of Hills & Dales v. Henckel, 5 Cir., 1972, 461 F.2d 847 (aff'd without opinion under Local Rule 21); Hammonds v. City of Corpus Christi, Texas, 5 Cir., 1965, 343 F.2d 162.

(3) Plaintiffs contend, however, that in this case the annexation is different because it was undertaken as the first step in a scheme to deprive them of just compensation for property taken for public purposes by passing illegal zoning laws or abusing the power of eminent domain. At some point, plaintiffs may be able to show that the annextion was the first step toward a denial of their constitutional right to just compensation. Whatever wrong the annexation might inflict, however, would be merged into the ultimate acts (such as the passage of unconstitutional zoning ordinances) constituting a deprivation of plaintiffs' rights, should such a deprivation ever occur.[3]

3. At oral argument counsel for plaintiffs stated that, since the District Court's dismissal of the complaint, the City has already begun to impose minimal restrictions on use of the subject land.

Taking all of plaintiffs' contentions as true, the annexation by itself is nothing more than an inchoate wrong that may never ripen.[4] See United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

(4,5) That the annexation itself inflicts no legal on these plaintiffs is clear, though it allegedly has caused a decline in the value of their

On the other hand, counsel for the City stated that no zoning ordinances had been passed. It is also unclear whether the City would have been able to exercise its eminent domain powers without first annexing the subject land. See Vernon's Tex.Civ.Stat.Ann. Arts. 969b, 1107, 1109b. If so, plaintiffs might some day be able to show that the annexation was a wholly unnecessary step designed to depress property values and thus decrease the cost of an eventual condemnation. See Foster v. Herley, 6 Cir., 1964, 330 F.2d 87. If not, such a showing would be virtually impossible. These ambiguities demonstrate the uncertainty of the legal injuries plaintiffs state in this case.

4. It would be premature to consider the question whether plaintiffs must exhaust any state administrative remedies before asking a federal court to strike down whatever zoning ordinances may come to govern the use of their land. See Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U.Chi.L.Rev. 537 (1974).

property. Many kinds of legislative and administrative action affect property values, but, without some diminution in the owner's rights of use, do not constitute a taking within the purview of the Fourteenth Amendment. See, e.g., Sayre v. City of Cleveland, 6 Cir., 1974, 493 F.2d 64 (approval of urban renewal plan allegedly causing decline in value of plaintiff's property held not to constitute a taking of the proeprty); Woodland Market Realty Company v. City of Cleveland, 6 Cir., 1970, 426 F.2d 955 (decline in property values caused by appropriation of adjacent land for urban renewal project held not a taking); 23 Tracts Land, etc. v. United States, 6 Cir., 1949, 177 F.2d 967, 969-970.

Some forms of relief need not await the occurrence of a completed legal injury. The very purpose of injunctive remedies, which the plaintiffs sought in the District Court, is to prevent the occurrence of certain kinds of injuries in the first instance. We believe, however, that the District Court's dismissal, denying both temporary and permanent injunctive relief, was not erroneous, because plaintiffs failed to establish the fundamental prerequisites for the issuance of an injunction.

(6-9) An injunction is appropriate only if the anticipated injury is imminent and irreparable. See O. Fiss, Injunctions 3, 9 et seq. (1972). Insofar as it is premised on the eventual passage of unconstitutional zoning ordinances, plaintiffs' complaint faces an impossible burden of showing

that any harm to them is imminent. At the time of the District Court's order dismissing this action, the City of San Antonio had passed no zoning ordinances applying to plaintiffs' land. In reviewing enacted legislation, the courts presume, as a matter of construction, that the legislative body has acted with due regard for the constitutional rights of affected parties. See generally, Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539 (1947). Where the legislative body has not yet acted, we must presume that when it does act it will respect rights guaranteed by the Constitution. The contours of the ordinances anticipated by plaintiffs cannot be predicted. Nor can it be foreseen how these laws will be interpreted judicially or applied administratively. Under these circumstances the injury plaintiffs fear about future zoning ordinances is not imminent.

(10) Any injury plaintiffs might suffer from abuse of the City's eminent domain power can be remedied when the City formally exercises that power. If the annexation serves no purpose other than to depress the value of the land, and if such loss of value is a legally cognizable injury, plaintiffs can seek compensation for the value of the land as determined at the time of the annexation. See City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E. 2d 52 (1963); City of Buffalo vs. J.W. Clement Company, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). If the annexation has injured plaintiffs by depressing the value of their

land, the injury is not irreparable, and thus cannot be the predicate for an injunction.

(11) It may develop that the City of San Antonio, in promulgating restrictions on the use of plaintiffs' land or otherwise assuring adequate approach clearances for aircraft using the runways at the Air Force Base, will cause a taking of the land, either through improper zoning or abuse of its eminent domain powers. At present, however, we discern no more than an allegedly ill-intentioned legislative action causing no cognizable injury.[5]

5. "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful." United States v. Constantine, 296 U.S. 287, 299, 56 S.Ct. 233, 228, 80 L.Ed. 233 (1935) (Cardozo, J., dissenting.) We agree with the District Court's conclusion that if the annexation is lawful in its effect, as it plainly is, the motives of those who legislated it are beyond judicial scrutiny.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3295

JOSEPH CHACON, JR., ET AL.,

Plaintiffs-Appellants,

versus

SAM GRANATA, ET AL., & RANDOLPH AIR FORCE BASE,

Defendants-Appellees.

- - - - - - - - - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - - - - - - - - -

ON PETITION FOR REHEARING

(July 28, 1975)

Before CLARK, Associate Justice*, GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

JOSEPH CHACON, JR. ET AL	)	
V.	)	CIVIL ACTION NO. SA-74-CA-136
SAM GRANATA, ET AL. AND RANDOLPH AIR FORCE BASE	)	

MEMORANDUM OPINION AND ORDER

On the 24th day of July, 1974, came on for hearing the above styled and numbered cause on Plaintiffs' Motion for Injunctive Relief. The Court, in hearing plaintiffs' motion, heard argument on the law and received evidence by way of the testimony of three witnesses as set out in more detail below.

In their Complaint, plaintiffs seek the following relief: (1) a Temporary Restraining Order preventing annexation of plaintiffs' land; (2) issuance of a permanent injunction preventing the exercise of extra territorial jurisdiction or of any jurisdiction over plaintiffs' land; (3) damages in the amount of TWO MILLION DOLLARS ($2,000,000.00) against all defendants jointly and severally; (4) a judgment declaring "the annexation and airport overlay ordinances to be unconstitutional"; (5) an injunction preventing the operation and effect of the "annexation and airport overlay ordinances" on the plaintiffs; (6) a

judgment declaring Article 46e, V.A.C.S., to have been unconstitutionally applied as to the plaintiffs; (7) a judgment declaring Section 3, paragraph 2, of the Charter of the City of San Antonio unconstitutional and enjoining its operation and effect; (8) and such other relief deemed equitable and just by the Court.

During the course of the two hour hearing, all parties were allowed to argue legal questions prior to adducing evidence. Following plaintiffs' arguments on the law, all defendants urged denial of injunctive relief on the basis of failure to meet the four conjunctive requirements necessary before the Court will issue injunctive relief:

1. Petitioner must make a strong showing that he is likely to prevail on the merits;

2. Petitioner must show that without such relief he will be irreparably injured;

3. Petitioner must show that the injunctive relief will not substantially harm the other parties to the proceeding; and

4. Petitioner must show that the granting of the relief does not contravene the public interest.

These four requirements are the traditional standards initially enumerated in Virginia Petroleum Jobbers Association v. Federal Power Commission,

259 F. 2d 921, 925 (DC Cir. 1958) and adopted by the Fifth Circuit in Belcher v. Birmingham Trust, 395 F. 2d 685 (Fifth Circuit, 1968).

In addition to denial of all injunctive relief, defendants further urged that this cause be dismissed for failure to assert a claim upon which relief may be granted because no proper statutory or constitutional basis had been alleged and shown and because the action is prematurely filed.

Although jurisdiction is doubtful in this case, the Court allowed plaintiffs to adduce testimony which would support their allegations of unconstitutionality. Plaintiffs called Col. John P. Rollston, Commander, 12th Flying Training Wing, Randolph Air Force Base, Sam Granata, City Manager of San Antonio, Texas, and Gilbert Boenig. Mr. Granata testified that the land in question which became annexed by the City of San Antonio on June 24, 1974 is adjacent to the City of San Antonio and not included within the boundaries of any other municipality. See Hammonds v. City of Corpus Christi, Texas, 343 F. 2d 162 (5th Cir. 1965); cert. den'd 382 U.S. 837 (1965). "The only limitation under Texas law on the power of a home rule city like Appellee to annex additional territory is that the territory shall be adjacent to the city and not included within the boundaries of any other municipality." He further testified that Colonel Rollston had "requested" the City to annex the land in question. Mr. Granata's testimony established that zoning ordinances

involving the land in question were in the preliminary planning phases and not likely to crystallize at any point in the near future. Col. Rollston testified that he had never made a "request" to the City of San Antonio for annexation of the land in question. He did testify, however, that he had advised the City Council that a pattern of airport encroachment was developing around Randolph Air Force Base. According to Col. Rollston, if unchecked, such encroachment would impair the flying mission of the Twelfth Flying Training Wing and could quite possibly lead to the ultimate closing of Randolph Air Force Base. Col. Rollston cited the case of Tinker Air Force Base in Oklahoma City, Oklahoma as an example of the effects of airport encroachment. In that case, the encroachment nearly caused Oklahoma City's leading industry to close. Col. Rollston's testimony effectively negated plaintiffs' allegations that a conspiracy exists between the City of San Antonio and Randolph Air Force Base. Rather, his testimony tended to show that the City of San Antonio, when met with the prospect of possibly losing a major industry and source of employment for its citizens, acted in what it felt was the best interests of the public and annexed the land in question. Mr. Boenig testified that he owns 132 acres of the land in question. He feels that he would be damaged if his land is zoned by the City of San Antonio at some point in the future.

Having considered the complaint

and answer, the written and oral arguments of the parties and all testimony adduced in this cause, the Court makes the following Findings of Fact and Conclusions of Law:

1. Randolph Air Force Base is a non-sueable entity of the United States Government and is, therefore, not a proper party to this cause of action. The cause of action is, therefore, dismissed as to Randolph Air Force Base.[1]

2. Randolph Air Force Base having been thus disposed of, the plaintiffs must rely for jurisdiction either upon diversity of citizenship or a constitutionally based cause of action.

3. There is no diversity of citizenship alleged or apparent. Therefore, if this Court has jurisdiction, it must depend upon the constitutionally based allegations of the plaintiffs' complaint.

4. The City of San Antonio is a home rule city and the land in

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[1]Even if Randolph Air Force Base is a proper party to this cause of action, plaintiffs allege damage in excess of $10,000. Such allegation denies this Court jurisdiction and would properly place jurisdiction in the Court of Claims. Tucker Act, 28 U.S.C., Sec. 1346 (a) (2).

question is adjacent to such city and not adjacent to any other municipality. Accordingly, the land in question is within the extra territorial jurisdiction of the City of San Antonio. See Hammonds, supra.

5. The annexation by the City of San Antonio of the land in question was proper and lawful and not unconstitutional. See Hammonds, supra; see also Incorporation Committee of the City of Hills and Dales, Texas, et al. v. Henckel, et al., S.A. 71, C.A. 206, affirmed Local Rule 21 by the Fifth Circuit.

6. No airport overlay ordinances are involved in this cause of action at this time.

7. Article 46e, V.A.C.S., is not involved in this cause of action.

8. Section 3, paragraph 2, of the Charter of the City of San Antonio is unconstitutional. See Incorporation Committee of the City of Hills and Dales, Texas, supra.

9. Plaintiffs have failed to meet the four above enumerated requirements which must be met prior to the granting of injunctive relief. Any question of enjoining the annexation of the land in

question is moot as such annexation was completed prior to the filing of this suit. Even if such question of annexation were not moot, plaintiffs have failed to meet the four requirements necessary for the granting of injunctive relief.

10. The instant action is prematurely filed. There has not yet been the zoning allegedly feared by plaintiffs in their Complaint. Even if such zoning were in progress, adequate administrative remedies are available in the zoning process. Plaintiffs' allegations of contemplated condemnation proceedings are merely speculative as no such proceedings are currently in progress. Even if such condemnation proceedings were currently in progress, such proceedings allow for adequate administrative remedies and plaintiffs' complaint is, therefore, premature at best.

11. Pursuant to the above findings, plaintiffs' prayer for damages is not sustainable on the merits.

12. Further, plaintiffs fail in their constitutional allegations and this Court, therefore, lacks and declines all jurisdiction.

It is, therefore, ORDERED, ADJUDGED AND DECREED that all relief sought by Plaintiffs' complaint shall be, and the

same is hereby, in all things DENIED and the cause is hereby DISMISSED with prejudice with costs charged to the Plaintiffs.

ORDERED AND ENTERED this 2nd day of August, 1974.

JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

AIR FORCE POLICY

However, in May, 1972, (a later draft was furnished the Study Group in January, 1973) Headquarters, U.S. Air Force issued Ref. 4, the draft of a Real Property Management Regulation (AFR 87-14) under the title, "AIR INSTALLATION COMPATIBLE USE ZONE: (AICUZ) PROTECTION OF AIR FORCE BASES AGAINST URBAN ENCROACHMENT." This title clearly indicates the fact that the Air Force is now embarked on a program to coordinate more effectively with its neighboring civilian communities to preserve the air operational* capability of its bases. This Chapter will discuss the specific provisions of the new AICUZ policies which seem destined to go from draft stage to official doctrine as soon as major command coordination is completed.

The concept established by Draft AFR 87-14 is designed to encourage compatible land use in non-Government areas around Air Force air bases. It does not anticipate that the land remain open space but that uses be compatible with the noise and occasional hazard which exist from aircraft operations.

*Furthermore, Draft AFR 87-14 will implement a Dept. of Defense memorandum of May 15, 1970, subject: Maintaining Installation Operational Capability.

Three basic techniques are provided to secure compatible land uses.

1. Encourage adoption of local zoning for compatible land use.

2. Exchange excess of surplus Government land for land of equivalent value within the compatible use area.

3. As a "last resort" purchase restrictive easements or fee title.

Technique 3 is considered a last resort method in view of the liklihood of budget restrictions. Technique 2 will be limited by the availability* of excess Government land. Hence it is clear that the principal technique of general use will be the adoption of local zoning.

The AICUZ concept has the following objectives, quoted from Paragraph 2, Ref. 4.

"a. Maintain aircraft operations without height or frequency limitation (except for safety requirements) or limitations on the aircraft noise associated therewith.

b. Restrict human habitation to pre-existing dwellings in areas subject to high noise exposure or vulnerable to aircraft accidents.

c. Prohibit large assemblage of people within certain limited portions of the controlled area.

d. Restrict land use to agriculture, grazing, and certain non-spectator type sports within the first 2,500 feet of the approach fan and limit the remainder of the AICUZ to compatible light industry, commerce, agriculture, recreation, storage, distribution, and other uses that may qualify for development in this area (see paragraph 7). Exercise caution on agricultural and grazing use so as not to encourage bird habitation.

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Incorporated Committee of City of Hills and Dales, Texas, Victor Engel, Helotes, et al. vs. Gerald Henckel, City of San Antonio,
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W. Barron, A. Holtzoff, & C.
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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1975

JOE CHACON, JR., ET AL.,

Petitioners

VS.

SAM GRANATA, CITY OF SAN ANTONIO,

RANDOLPH AIR FORCE BASE,

Respondents

ON PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. of Petitioners A-14 - A-21) is unreported. The opinion of the Court of Appeals for the Fifth Circuit, (App. of Petitioners A-1 - A-12) is reported at 515 F2d 922.

JURISDICTION

Respondents admit that jurisdiction is alleged pursuant to 28 U.S.C.A. §1254(1), but deny that a substantial constitutional basis exists for jurisdiction.

QUESTIONS PRESENTED

(1) Does a Right Exist to Sue the U. S. Air Force for Damages?

(2) Must Zoning be Completed after Annexation before a Remedy exists in the Courts?

(3) Does the City have the right to Annex without approval by the Voters?

STATUTORY PROVISIONS ALLEGED

42 U.S.C. 1983, 28 U.S.C. 1254 (1)
28 U.S.C. 1346, 2201, 2674
Constitutional Amendments 5 and 14.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

Respondents feel compelled to clarify some of the statements made by the Petitioners under their statement of the case.

Respondents deny that the City was coerced or threatened by Randolph Air Force Base to annex the property and zone it in order to avoid condemnation of an interest in Petitioners' land or payment of damages for "taking of an interest" in the land.

While it is true that Randolph Air Force Base was interested in having the City annex the land here involved, it was merely one of many considerations which led the City to annex the area. The purposes which might have motivated the City in this annexation are of no consequence however in determining the legality of the annexation. Under the authorities hereinafter cited, the only requirement for a legal annexation by a home rule city such as San Antonio in Texas is that the territory (1) is adjacent to the City and (2) not included within the boundaries of any other municipality. Both of these conditions existed here. (App. A-8)

The Petitioners main concern as to these Respondents appears to be that their land will be damaged by the limitations that the City may put on the use of Petitioners' land. Such a limitation of use can only result from a zoning ordinance adopted by the City. Since such an ordinance has not yet been passed by the City, the Petitioners' complaint in that regard is premature. (App. A-6 - A-7)

ARGUMENT

Jurisdiction - No Substantial Constitutional Basis Exists for Jurisdiction

The Petitioners have failed to assert any real basis for federal jurisdiction over the matters alleged in Petitioners' complaint. The trial court recognized that the law is well-settled with respect to the allegations made by Petitioners. Incorporated Committee of City of Hills And Dales, Texas, Victor Engel, Helotes, et al. vs. Gerald Henckel, City of San Antonio. Civil No. SA 71 CA 206, January 12, 1972, Civil No. 72-1652 (5th Cir. 1972) Affirmed Local Rule 21 and Hammonds vs. City of Corpus Christi, Texas, 343 F2d 162 (5th Cir. 1965), cert. denied 382 U.S. 837 (1965), and the mere assertion of federal statutes and provisions of the Constitution by the Petitioners did not create a basis for federal jurisdiction, Stanturf vs. Sipes, 335 F2d 224 (8th Cir. 1964) cert. denied 85 S.Ct. 676, 379 U.S. 977, 13 L.Ed. 567 (1964).

A claim under a question of constitutionality must be substantial and not frivolous or a matter of form. A claim is not substantial if it is without merit or foreclosed by prior authoritative decisions. Skokomish Indian Tribe vs. France, 269 F2d 555 (9th Cir. 1959) W. Barron & A. Holtzoff & C. Wright, Federal Practice and Procedure, §25, 123. (Rules Edition 1961).

The trial court in this case after hearing testimony found that the Petitioners had failed in all things to prove a constitutional claim (Appendix p. A-20). Thus the trial court properly, after giving the Petitioners an opportunity to be heard, determined that there was no constitutional question and dismissed the case, in compliance with Harmon vs. Superior Court of State of California in and for Los Angeles County, 307 F2d 796 (9th Cir. 1962), and Clark vs. Paul, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001 (1939).

RESPONSE TO QUESTIONS RAISED BY PETITIONERS

(1) Does a Right Exist to Sue the U. S. Air Force for Damages?

The U. S. Attorney will respond and address himself to this point.

(2) Must Zoning be Completed after Annexation before a Remedy exists in the Courts?

The Petitioners complain of alleged illegal zoning. No zoning ordinance has been passed, and at best the relief requested is premature. Under the circumstances of the present case, the alleged injury to the Petitioners, the imposition of future restrictive zoning, has not ripened and is certainly not imminent. The Petitioners would still have a cause of action under eminent domain proceedings or compensation for unlawful zoning if the action ever ripens.

The annexation by the City was procedurally proper and lawful under Texas law.

Hammonds vs. City of Corpus Christi, Texas, 343 F2d 162 (5th Cir. 1965), cert. denied 382 U.S. 837 (1965). Incorporated Committee of City of Hills and Dales vs. Henckel, 461 F2d 847 (5th Cir. 1972, Affirmed without opinion under Local Rule 21).

Petitioners allege damages to their property based on a taking of private property. The basic method of taking alleged by Petitioners is restrictive zoning. No zoning has been accomplished by the City. As the trial court noted, "Even if such zoning were in progress adequate administrative remedies are available in the zoning process." (Appendix p. A-20).

The Petitioners also allege inverse condemnation.

The contemplated condemnation proceedings alleged by the Petitioners are merely speculative. Again the Petitioners would have a remedy if such condemnation proceedings were in progress. Such proceedings would allow adequate administrative remedies.

Specifically, the trial court noted, "plaintiffs' complaint is premature at best." (Appendix p. A-20)

Petitioners cite the cases of U.S. vs. Causby, 66 S.Ct. 1062 (1946) and U.S. vs. C. M. Dow, 357 U.S. 17, 78 S.Ct. 1039

as authority for their claim for damages. The cases cited are condemnation cases, and have no applicability to the facts of the instant case.

In summary, the Fifth Circuit recognized the premature nature of the Petitioners' action, as well as the possibility that the injury, "might never ripen". Chacon vs. Granata, 515 F2d 922 (1975) (App. A-3).

(3) Does the City have the right to Annex without approval by the Voters?

Yes. Annexation of additional territory under Texas law is limited only to the extent that the territory be adjacent to the City, and not included within the boundaries of any other municipality. Hammonds vs. City of Corpus Christi, 343 F2d 162, (5th Cir. 1965), cert. denied, 382 U.S. 837 (1965).

The present case meets the test propounded under the well-settled and established law in this area. The Fifth Circuit has, "twice upheld annexations factually indistinguishable from this one." Hills and Dales vs. Henckel, supra., Hammonds vs. City of Corpus Christi, supra., quoted from Chacon vs. Granata, (Petitioners' App. A-8)

As the Fifth Circuit Court noted (Petitioners' App. A-5):

> "Where annexation of private land by city was lawful in its effect, motives of those who legislated it were beyond judicial scrutiny."

The court quoted from United States vs. Constantine, 296 U.S. 287, 299, (1935), "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."

Petitioners attempt to maintain that this case differs from the well-settled law in the area because it is concerned with deprivation of property rights through illegal zoning. However, in fact the territory which is the subject of this lawsuit has merely been annexed, and no zoning or condemnation proceedings have been completed. The case is on all fours with Hammonds and Hills and Dales. The Petitioners' allegations are merely futile attempts to raise issues that this court has previously rejected.

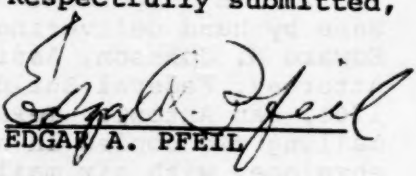
CONCLUSION AND PRAYER

The Petitioners are again attempting to invoke the jurisdiction of the court on the grounds that said annexation is a deprivation of property and did not comply with the concept of due process of law as set forth in the U. S. Constitution. This attempt comes on the heels of numerous decisions that have ruled that the federal court has no jurisdiction. Writ of Certiorari has twice been denied by this Supreme Court in cases of identical

character, Pan American Production Co. vs. Texas City, 303 S.W.2d 780, (Tex.Sup.Ct. 1957) Appeal dismissed 355 U. S. 603, Hammonds vs. City of Corpus Christi, supra.

The Fifth Circuit in its opinion has adequately addressed itself to the legal relief requested by Petitioners. The disposition of such points against the contentions of the Petitioners are correct and Writ of Certiorari should be denied.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTS
SAM GRANATA AND CITY
OF SAN ANTONIO

CERTIFICATE

I, Edgar A. Pfeil, whose application is on file in the Admissions Office and who is to be admitted as a member of the Bar of the Supreme Court of the United States on October 14, 1975, representing the Respondents Sam Granata and City of San Antonio herein, do hereby certify that this Brief in Opposition has been served upon the following parties herein:

(1) On Petitioners by hand delivering three copies to Earle Cobb, Jr., 1665 Frost Tower, San Antonio, Texas, counsel of record for Petitioners, on this 6th day of October, 1975.

(2) On Respondent Randolph Air Force Base by hand delivering one copy to Edward M. Johnson, Assistant U. S. Attorney, Federal Building, P. O. Box 1701, San Antonio, Texas 78296, and by mailing two copies in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, counsel of record for Respondent Randolph Air Force Base, on this 6th day of October, 1975.

I further certify that all parties required to be served have been served.

Edgar A. Pfeil

EDGAR A. PFEIL

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-381

JOE CHACON, JR., ET AL., PETITIONERS

v.

SAM GRANATA AND RANDOLPH AIR FORCE BASE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in affirming the dismissal of their suit against Randolph Air Force Base on the ground that the suit was barred by sovereign immunity.

Petitioners, twenty owners of property that had been located near the City of San Antonio, Texas, initiated this action against the City, its City Manager, and Randolph Air Force Base, alleging that annexation by the City of their property was the first step in an unlawful scheme undertaken by the City and Randolph Air Force Base to deprive them of their property without just compensation through proposed

594-671—75——1

zoning ordinances and eminent domain proceedings to be initiated after annexation depressed the value of their property.[1] They sought a permanent injunction against any further exercise of jurisdiction over the property in question by the City, a declaration that the annexation and proposed zoning ordinances are unconstitutional, and damages of two million dollars (Pet. App., pp. A–5 to A–7, A–14; 515 F. 2d 922, 923-924).

After considering the testimony of the City Manager of San Antonio, an Air Force Officer stationed at Randolph, and one of petitioners, the district court found that petitioners had failed to show any conspiracy between the Air Force and the City unconstitutionally to deprive petitioners of their property, and that "Randolph Air Force Base is a non-sueable [sic] entity of the United States Government and is, therefore, not a proper party to this cause of action" (Pet. App., p. A–18);[2] that petitioners had failed to establish prerequisites for the issuance of an injunction; that the City's annexation of the property in question was lawful and proper; and that petitioners' damage claims were premature since the anticipated zoning ordinances had been neither enacted nor applied to

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[1] Petitioners now claim, for the first time, that they were damaged by overflights by Air Force planes. No such claim was made in either the district court or the court of appeals; therefore it is not properly before this Court.

[2] The court also noted that even if Randolph Air Force Base were subject to suit, the court had no jurisdiction to adjudicate a claim against the United States exceeding $10,000. See 28 U.S.C. 1346(a)(2).

petitioners' property (Pet. App., pp. A–18 to A–20). Accordingly, the court dismissed the action as to Randolph Air Force Base and dismissed the complaint with prejudice (Pet. App., pp. A–18, A–20 to A–21). The court of appeals affirmed (Pet. App., pp. A–5 to A–12; 515 F. 2d at 923–926).

Petitioners contend that the court of appeals erred in affirming the dismissal of their suit against Randolph Air Force Base. It is well established, however, that such suits are barred by sovereign immunity; Congress has not authorized suit or execution against a military base, which is an entity of the United States. See, *e.g., Blackmar* v. *Guerre,* 342 U.S. 512, 515.

The district court was in any event without jurisdiction to entertain petitioners' claim, which exceeded the maximum cognizable under 28 U.S.C. 1346(a)(2).

Moreover, petitioners failed to state a cause of action against the federal respondent; the annexation was undertaken solely by the City.[3] Petitioners do not allege, nor did they do so below, any act by the federal government that caused them injury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[3] *United States* v. *Causby,* 328 U.S. 256, and *United States* v. *Dow,* 357 U.S. 17, upon which petitioners rely, both involved takings by the federal government and are therefore inapposite.

U.S. GOVERNMENT PRINTING OFFICE: 1975